TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 193

No. 719

THE COLORADO NATIONAL BANK OF DENVER, APPELLANT

vs.

HOMER F. BEDFORD, AS TREASURER OF THE STATE OF COLORADO

APPEAL FROM THE SUPREME COURT OF THE STATE OF COLORADO

FILED FEBRUARY 12, 1940.

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[fol. 1]

IN DISTRICT COURT OF THE CITY AND COUNTY OF DENVER

HOMER F. BEDFORD, as Treasurer of the State of Colorado, Plaintiff,

v.

THE DENVER SAFE DEPOSIT COMPANY, a Corporation; T. W. Rinker and L. R. Kirby, Co-partners, Doing Business Under the Firm and Style Name of The Guardian Safety Vault Company, The Colorado National Bank, a Banking Corporation, Defendants

AMENDED PETITION FOR DECLARATORY JUDGMENT

I

Plaintiff is the duly elected, qualified and acting Treasurer of the State of Colorado, and as such is delegated the duty of administering and enforcing the provisions of the Public Revenue Tax Act of 1937, appearing as Chapter No. 240, 1937 Session Laws of Colorado.

(Paragraphs numbered II and III are omitted as they refer only to defendants other than the Bank, and the action was dismissed as to the said other defendants.)

IV

The defendant, The Colorado National Bank, is a national banking corporation duly organized and existing under and [fol. 2] by virtue of the laws of the United States of America.

V

(Omitting portions of paragraph V relating to other defendants.)

However, said defendant, The Colorado National Bank, conducts its said safety deposit services in its banking house or building located in the City and County of Denver, and said safety deposit boxes are fixtures in and constructed within said building as a part thereof, and constitute part of the assets of said defendant bank. Regular and fixed charges are made for the rental of said safety deposit vaults

to any member of the public, whether he be a customer of said bank in its rendition of its other services or not.

VI

Pursuant to the provisions of said Public Revenue Service Tax Act of 1937, plaintiff prescribed and published rules and regulations and interpretations of said Act on or about the 10th day of June, 1937. Subsequently thereafter, said rules and regulations and interpretations were amended, and as amended republished on the 22nd day of October, 1937. Provisions pertinent to said depository services operated by defendants herein, are in words and figures as follows:

"10. Banks. Services rendered or performed by banks were included in the Act. It now appears that the law is invalid as applied to National Banks. Following the general principle of law and taxation now established, to the effect that where a tax statute intended to apply state-wide to all banks, if invalid as to National Banks is invalid as to all State Banks, the service tax is therefore invalid as to all [fol. 3] banks, State and National. Provided, however, that where a bank or other similar institution, whose regular services are not subject to the service tax, owns or operates a taxable business or performs taxable services aside from and outside its regular business, such as the operation of safety deposit vaults, hotel, lodging house, real estate brokerage services, etc., such outside services are taxable and the bank must collect and remit the tax thereon."

"11. Banks—Acting As Agent or Trustee. Taxable services performed at the request of a bank, which services are being performed for a client of such bank, paid for by such client, are subject to the Service Tax Act and taxable, even though the bank actually requests the service and actually remits payment for the charges therefor. The bank in such instances is merely acting as agent for its client."

"27. Depositories. Such service rendered as the furnishing of safety vaults by depositories or banks come within the Act, and the tax applies to the charge made therefor."

Pursuant to said Act and said rules and interpretations, plaintiff demanded from each of said defendants that he collect and remit the 2 per cent service tax upon the charges

for depository services, to-wit: On or about July 29, 1937, plaintiff * * * on August 21, 1937, * * * duly mailed postpaid copies of the original draft of the above rules and interpretations before same were amended, to the Colorado Bankers Association, Tabor Building, Denver, Colorado, with the demand that banks comply therewith, and that the Association so inform its members; and on or about August 27, 1937, plaintiff, by and through J. B. Owens, state revenue collector, made a personal call upon defendant Colorado [fol. 4] National Bank, and discussed said demand with Mr. W. L. Robertson and Mr. George Klein, and thereupon repeated the demand that said defendant collect and remit service taxes on its depository services and make returns therefor; and each of said defendants has refused to collect or remit any of said taxes or in any manner comply with the said law.

VII (As Amended)

It is the contention of plaintiff that all of said defendants are engaged in rendering a taxable service under the terms of said Public Revenue Service Tax Act, which service is named in said Act, Section 5 (c), as "Depositories," and that they are responsible and liable for said tax, whether collected from its customers or not, in the manner provided in said Act.

It is plaintiff's further contention that services performed by depositories, whether they be operated by a Colorado State corporation organized for the sole purpose of operating depositories or by individuals, or by banks, State or National, are performing taxable services within the purview of said Act.

It is plaintiff's contention that the operation of "Depositories" constitutes the rendition of taxable services within the Service Tax Act, Section 5 (c) thereof, and that National banks must collect the tax on such services even though the other services rendered by such bank, commonly known as services performed by a "bank," are not taxable; and that all defendants are operating such "depositories" in the same manner. Plaintiff further contends that the fact that a National Bank, in operating a "depository," operates same in connection with or as a part of its banking business, or that such operation is authorized by law, makes no difference, and does not exempt the bank from complying [fol. 5] with the Service Tax Act, as the tax is not imposed

on the banks but upon the purchaser of the service. The only service rendered, performed or furnished, or business engaged in, by any of the defendants, claimed by plaintiff to be taxable, is the operation of the "Depositories." Plaintiff further contends that the rules set forth in paragraph VI hereof are reasonable, proper and within the law, and constitute a declaration of plaintiff s claim herein.

VIII

A controversy exists between plaintiff and defendants as to whether or not such services are taxable, and as to whether or not said defendants should collect and remit said taxes under the terms of said Act. The nature of such controversy, in substance, is that the Act in naming banks as rendering a taxable service, was, in effect, imposing a tax upon the banks in conflict with the federal laws, and hence invalid as to the banks, and that insofar as such act purports to tax the services of a depository not operated by a bank, is discriminatory and invalid.

IX

In administering said Public Revenue Service Tax Act of 1937, plaintiff has not and does not levy or demand any tax upon a National Bank, nor does plaintiff require or demand that any National bank pay any tax or license directly from the funds of such bank, but plaintiff has demanded and required all persons or institutions operating a depository or depository services, to collect and remit the required 2 per cent tax on charges made therefor; and plaintiff further has demanded and continues to demand that any person or institution or corporation failing or refusing to so collect such tax from its customers, be held re- [fol. 6] sponsible and liable therefor in the manner provided, whether collected from its customers or not.

Plaintiff has not and does not require or demand a National bank to collect or remit a service tax upon any of its services performed, except upon services performed in operating a depository, and upon services performed for a bank acting in a trust or representative capacity for its customer or client. Plaintiff is informed and believes, and so alleges the facts to be, that National banks are complying with the requirement and ruling requiring banks to pay service taxes on services performed at the request of such

bank acting in the representative or trust capacity for its clients, customers and trust estates.

Wherefore, plaintiff prays for a declaration of rights and other relief as follows:

First. That this Court determine and declare that the services performed by defendants in operating safety deposit vaults, are taxable pursuant to the terms of the Public Revenue Service Tax Act of 1937.

Second. That this Court determine and declare that the operation of such safety deposit vaults by said defendant Bank, is a taxable service rendered by such Bank to the public, in that such Bank in so operating safety deposit vaults comes within that provision of said Act covering depositories, and that in that respect said Act is valid and a proper tax is imposed.

Third. That this Court determine and declare that the defendants, Safety Deposit Companies, are operating depository services within the meaning of said Act and are subject to its provisions, regardless of whether or not the Act is invalid as to the other defendant.

[fol. 7] Fourth. That this Court render such other judgment as may be just and equitable, and for costs of this action.

(Said petition was verified.)

IN DISTRICT COURT OF CITY AND COUNTY OF DENVER

ANSWER TO AMENDED PETITION

Now comes the defendant, The Colorado National Bank of Denver (hereinafter called the Bank), by Bartels, Blood and Bancroft, its attorneys, and answering plaintiff's amended petition for declaratory judgment and the amendment to paragraph VII thereof alleges:

1. That it admits the allegations of paragraph I.

2. That as to paragraph IV, its admits that the Bank is a national banking association organized and existing under and by virtue of the Constitution and Acts of Congress of

the United States, with its banking house or office and place of business in the City and County of Denver, Colorado; and the Bank alleges that as such national banking association it is an agency and instrumentality of the United States.

3. That it admits the allegations of paragraphs V and VI. * * *

4. That further answering paragraph VI as to the rulings, regulations and interpretations of the plaintiff with reference to the said Service Tax Law and the notices given by him to the Bank, it alleges that on April 19, 1938, the plaintiff gave the Bank notice in writing that under his rulings, regulations or interpretations, the only service performed by banks subject to the Service Tax Act is the operation of depositories and safety deposit boxes, and that [fol. 8] none of the Bank's other services, and particularly none of its services rendered and performed in a fiduciary capacity are taxable; and that he made his said ruling, regulation or interpretation and gave the defendant Bank the said written notice and advice thereof, notwithstanding his contention in this action that any alleged tax on services performed by the Bank is not a tax upon the Bank, but upon the purchaser of the said services and for whom they are rendered, performed or furnished; and the Bank admits that the plaintiff contends as set forth in his amendment to paragraph VII of his said amended petition, without, however, admitting that his said contentions are valid, legal or proper.

5. That the Bank alleges that it has refused and will refuse to comply with the said Service Tax Act for the reasons hereinafter stated; and as to the allegations of paragraphs VIII and IX of the said petition, the Bank admits that there is an actual and justiciable controversy between the plaintiff and the Bank requiring judicial determination and a declaration of their rights with respect thereto, and alleges that the said controversy arises from the plaintiff's contentions, and from the defendant's contentions as hereinafter stated, as to the proper construction, operation and effect of the said Service Tax Act, particularly as it may affect the Bank as a national banking association. The Bank also admits that the plaintiff has demanded that the Bank be held liable and responsible to the plaintiff for the full amount of the said service tax at the rate of two per cent on all charges made by it for its said depository serv-

ices, in the manner provided in the Act and as hereinafter specified, and that it remit the said full amount to the plaintiff whether or not it collects the said sum, in whole or in part, from its customers receiving the said depository [fol. 9] services.

6. That with reference to the safe deposit services and the Bank's operation of a public safe deposit service, the Bank alleges that the same is an incident to and integral part of its banking business, and requisite for the safe and convenient attainment of the purposes for which it was created under the authority and laws of the United States. Further, in this respect, the Bank avers that it owns its banking house, office and building in the City and County of Denver, Colorado, which is subject to ad valorem tax, and is so taxed as real estate; that its safe deposit boxes are fixtures in the said building and are subject to the said ad valorem tax and are so taxed; that constructed within the said building, as a part of it, are two vaults of steel and concrete, one four stories in height and the other two stories in height; that only parts or portions of the said vaults are used in operating a depository for the safekeeping of valuables for the general public; that only the first and second floors of one of the said vaults is so used, and that the third and fourth floors of the one said vault are used by the Bank for the keeping, in its banking business, of its cash, securities and other valuables, and only the second floor of the other said vault is used as a depository for the safe keeping of valuables for the general public, while the first floor or basement thereof is used for banking purposes, as above stated. That the vaults of the said Bank, with their fixtures, were constructed at a cost of not less than $162,000.00. That the rentals procured for the use of portion of the said vaults, as aforesaid, are reported to the Comptroller of the Currency as profits or income of the Bank to be used and dis- [fol. 10] tributed as provided by the Acts of Congress and the rules and regulations of the said Comptroller, and, in part, repay the Bank for the cost of the construction and the operation of the two said vaults in their entirety, and the Bank's other operating expenses and charges. That the two said vaults in their entirety and the fixtures thereof are part of the assets of the Bank, and that the said assets and the operations thereof and the rentals received therefrom are examined, inquired into and considered by the Comp-

troller of the Currency of the United States in determining and passing upon the conditions and earnings of the Bank, and under the laws of the United States are subject to the said Comptroller's supervision.

7. That under and pursuant to the permission granted by the United States Revised Statutes, Sec. 5219, as amended (U. S. C. A., Title 12, Sec. 548), the State of Colorado has by law elected to tax and is taxing the Bank, on its net income, from the period commencing July 1, 1937, and that the said state, and political subdivisions thereof, have taxed and are taxing the Bank's real property to the same extent, according to its value, as other real property is taxed; and that prior to July 1, 1937, the said state, and its subdivisions, taxed the shares of the said Bank under and pursuant to the first method of taxation granted and permitted by the said Section 5219, as amended.

8. That the subject of this action and the matter in controversy is a suit of a civil nature, in equity, and arises under the Constitution or laws of the United States, or both.

9. That the said controversy arises because of the plaintiff's said rulings, regulations or interpretations of the said Service Tax Act and the Bank's contentions that they are [fol. 11] invalid, unlawful, unconstitutional and improper as applied to the Bank; and that its said contentions are as follows, to-wit:

(1) That the said Service Tax Act expressly provides in part, in recognition of the Constitution of the United States and of the Acts of Congress, restricting taxation of national banks, that "all services rendered or performed which the State of Colorado is prohibited from taxing under the Constitution or laws of the United States shall be exempt from taxation," under the said Act; that the depository service of the Bank is part of its banking business under its federal charter and within the said quoted exemption; and that the said quoted provision should be construed and interpreted as exempting the Bank's said service from taxation because it would otherwise be subjected to the other provisions of the said Act, which must then be held unlawful and unconstitutional as against it and which are as follows, to-wit:

(a) That the Bank in performing any banking service, including the service of renting safe deposit boxes, is obli-

gated by the Act to account to the State Treasurer, and is expressly made the "taxpayer" thereunder;

(b) That there is imposed, by the said Act, a tax equivalent to 2% of the value of services rendered or performed by any person, and particularly by the Bank, engaging or continuing in its business as a bank, except as to interest on money loaned;

(c) That as such taxpayer the Bank is required, in engaging in the banking business, and in rendering and performing banking services, including the rental of safe deposit boxes, to apply for and procure a license from the State Treasurer, and that its failure to do so is a crime and [fol. 12] misdemeanor, punishable accordingly;

(d) That the Bank, in engaging in the banking business, and rendering or performing services, including the rental of safe deposit boxes, is liable and responsible for the tax imposed and payable upon those services rendered or performed; and for failure to pay the said tax, if there be any deficiency in that respect, the Bank shall be additionally liable for 10% of the deficiency and interest at the rate of 1% per month on the amount of the deficiency from the time due;

(e) That if no return be made by one performing services taxable under the said Act the said State Treasurer may give written notice to make such return within 30 days from the date thereof, and in the event of the failure or refusal of such person to make such return, the said State Treasurer may make it, and it shall be prima facie correct, and the amount of the tax due thereon shall be deemed a deficiency and subject to the addition of penalties and interest;

(f) That contrary to the laws of the United States, and particularly United States Revised Statutes, Sec. 5242 (U. S. C. A., Title 12, Sec. 91), a first and prior lien for the said tax is imposed upon all of the goods and property of the Bank, and that said lien shall take precedence over other liens or claims of whatsoever kind or nature; and

(g) That the refusal of the Bank (and it has refused) to pay said tax from time to time is, in each instance, a crime and misdemeanor, punishable by a fine of $1,000.00 or by imprisonment not exceeding six months in the county jail, or both such fine and imprisonment.

(2) That the Bank, as a national bank, is a governmental [fol. 13] agency or instrumentality of the United States; that the defendant in enforcing, or attempting to enforce, the said Service Tax Act as to the Bank, as hereinbefore alleged, is imposing a tax against the Bank in contravention of the constitutional immunity of the United States and their governmental agencies and instrumentalities, and under color of the said Service Tax Act and under color of his rulings, regulations or interpretations with respect thereto is seeking to deprive the Bank of a right, privilege or immunity secured to it by the Constitution of the United States.

(3) That services furnished by storage and warehouse businesses conducted generally by storagemen and warehousemen are not taxed under the said Act; that the legal relation between a customer or depositor and such storagemen and warehousemen with respect to the deposit of valuables and other personal property is that of bailor and bailee; that the services of the Bank in this respect are identical and the legal relation between its customers and it is the same; and that the claim asserted by the plaintiff, as hereinbefore alleged, with respect to the said Service Tax upon the Bank's depository business is an unlawful and unjust discrimination between so-called storagemen and warehousemen doing depository businesses not subject to the said tax, and national banks doing depository businesses, and is in violation of the Constitution of the State of Colorado and of the Fourteenth Amendment to the Constitution of the United States.

(4) That the plaintiff by admitting that none of the other services, such as fiduciary services, performed by the Bank are taxable even though the Bank might collect the service [fol. 14] tax on such services from those for whom they are performed, and that all of such other services are exempt from taxation is estopped to deny that its depository services are also exempt; and that any interpretation of the said Act made by the plaintiff other than that all of its services are exempt is arbitrary, inconsistent, discrimnatory and unlawful.

(5) The that the State of Colorado, by the enactment of its Income Tax Law (1937 Session Laws of Colo., Ch. 175), subsequent to the enactment of the said Service Tax Act,

and by the express adoption, in the said Law (Sec. 2, e, (1), p. 681) of "the method numbered (4) authorized by the Act of March 25, 1926, amending Section 5219 of the Revised Statutes of the United States" (U. S. C. A., Title 12, Sec. 548) as the said state's exclusive method of taxing national banks, and by the repeal, in the said law, of all laws in conflict with it, has repealed the said Service Tax Act, insofar as it may be construed as attempting to tax a national bank.

Wherefore, the Bank prays:

First. That the prayer of the plaintiff's amended petition for a determination and a declaration of rights as against the Bank and for other relief be denied, and said petition be dismissed.

Second. That this Court determine and declare that under and by virtue of the Constitution and laws of the United States and under and by virtue of the Constitution and laws of the State of Colorado, all services performed by the Bank, including its depository services, are exempt from taxation under the Public Revenue Service Act of 1937 of Colorado.

Third. That this Court render such other and further re-[fol: 15] lief as may be just and equitable, and judgment against the plaintiff for the Bank's costs in this cause expended.

(The answer was verified.)

IN DISTRICT COURT OF CITY AND COUNTY OF DENVER

STIPULATION TO STAND ON DEMURRER ETC.

1. That this cause may be forthwith set for argument and final determination upon the general demurrer of plaintiff filed herein to the answer of The Colorado National Bank of Denver; that it is the intent of the parties that the matters herein involved be finally and fully determined upon said demurrer, and that a judgment be entered upon such determination declaring the rights and liabilities of the parties hereto.

2. That the parties will stand upon the ruling of the Court on said demurrer to the answer of The Colorado

National Bank of Denver, and thus permit a declaratory judgment to be entered in accordance with the decision of the Court; provided, however, that both parties reserve their rights to object and except to the ruling and judgment of the court in whole or in part, and to seek a review thereof in any proper court of appellate jurisdiction.

IN DISTRICT COURT OF CITY AND COUNTY OF DENVER

DEMURRER TO ANSWER

Comes now the plaintiff above named, by his attorneys, and demurs to the answer of the defendant, The Colorado National Bank of Denver, for the following reasons:

[fol. 16] 1. That said answer does not state facts sufficient to constitute a defense to the petition herein as amended.

2. The facts alleged in said answer are not sufficient to entitle defendant to the relief it prayed for in said answer; nor are such facts sufficient to warrant a denial of the relief prayed for in said petition as amended.

IN DISTRICT COURT OF CITY AND COUNTY OF DENVER

MEMORANDUM OPINION

Homer F. Bedford as Treasurer of Colorado seeks a judgment declaring that the services rendered by Colorado National Bank in maintaining safety deposit boxes and vaults for use for hire by the public are taxable under Colorado Service Tax Law of 1937. The Bank claims such services are exempt from taxation. The matter is before the Court on the plaintiff's demurrer to defendant's answer.

The Colorado Service Tax law imposes a tax on services rendered, makes the person performing the services personally liable to the state for all taxes paid by those receiving the services and also personally liable to the state for all taxes due for services rendered, whether they are collected or not. The Act defines the term "taxpayer" as the person obligated to account to the state for taxes collected or to be collected or due the state. Persons performing

taxable services are required by the Act to procure a license from the state and to make monthly reports to the state treasurer. The tax imposed by the Act is made a lien upon the goods and property of the person performing the services.

In the detailed list of businesses in connection with which services are taxed under the Act appears the following: "banks, finance companies, trust companies and deposi- [fol. 17] tories," and plaintiff contends that this language authorizes the state in demanding that plaintiff account to the state for depository services rendered, in accordance with the Act. Section 7 of the Act provides, inter alia, that "all services rendered or performed which the State of Colorado is prohibited from taxing under the Constitution or laws of the United States, or the State of Colorado, shall be exempt from taxation under this Act," and the Bank's claim of exemption is based upon this provision. The Bank claims that the service tax law makes the performer of the services the taxpayer, and that such form of taxation is prohibited by Act of Congress (U. S. Code Annotated, Title 12, Sec. 548), reading in part as follows:

"The legislature of each state may determine and direct, subject to the provisions of this section, the manner and place of taxing all the shares of national banking associations located within its limits. The several states may (1) tax said shares, or (2) include dividends derived therefrom in the taxable income of an owner or holder thereof, or (3) tax such associations on their net income, or (4) according to or measured by their net income, provided the following conditions are complied with:

1. (a) The imposition by any state of any one of the above four forms of taxation shall be in lieu of the others, except as hereinafter provided in subdivision (c) of this clause."

It is admitted that the State of Colorado taxes national banks on their income. The state admits that if the service tax law imposes the tax on the bank, that the exemption applies, but asserts that under our statutes the person performing the services is merely an agent of the state for [fol. 18] collecting the tax, and consequently the real taxpayer is the recipient or the purchaser of the services. Cases are cited by both sides from other states interpreting

tax laws similar to the one here being scrutinized. In the recent case of Rinn v. Bedford, not yet reported, our Supreme Court held the service tax law constitutional and denominated the tax imposed an excise tax. While the question of who is the taxpayer was not directly involved in that case, the opinion refers to the "tax imposed upon attorneys at law." The Court was referring to taxes upon services rendered by attorneys and not to services rendered to attorneys by others. The California sales tax law imposes the tax on retailers as a tax on the privilege of doing business, and has been upheld as a valid excise tax. The Kentucky sales tax law by its terms makes the retailer the taxpayer, but the courts of that state interpreted it as a tax on the consumer or buyer. (City of Covington v. Tax Commission, 77 S. W. (2d) 386.) The Court in that case cited Pierce Oil Co. v. Hopkins, 282 Fed. 253, a case from Arkansas, which held that a gasoline tax law requiring dealers to collect one cent a gallon for each gallon of gasoline sold, imposed a tax on the seller, and the Kentucky Court distinguishes the Pierce case because the Arkansas Statute imposed upon the seller a personal obligation to pay the levied tax whether he collected it from the purchaser or not. The Court in the Pierce Oil Co. case said:

"It is doubtless true that the amount of the tax usually does fall finally upon the purchaser because the seller will naturally fix a price or an amount to be collected for the commodities sold which will include the amount of tax. * * * The seller is required to register and to file a report of his sales and show therein 'the amount of tax due [fol. 19] by said seller.' The seller must pay the tax unless he collects the amount from the purchaser. * * * The penalties provided in the act are all levelled against the seller."

The Colorado Act makes the seller of the services personally liable to the state and prescribes severe penalties to be enforced against the seller.

In Panhandle Oil Co. v. Mississippi, 277 U. S. 218, 72 L. Ed. 857, the Court held the United States not liable to pay a gasoline tax. The Mississippi law required persons engaged in selling gasoline to pay one cent per gallon of gasoline sold for the privilege of engaging in the business. The retailer was the taxpayer. The Court said:

"The necessary operation of these enactments when so construed is directly to retard, impede and burden the exertion by the United States of its constitutional powers to operate the fleet and hospital."

The answer of defendant alleges facts, admitted by the demurrer, from which the conclusion must follow that the defendant is a governmental agency or instrumentality, and that the services performed by it in operating depositories are an incident to and integral part of its banking business. Considering the provisions of the Service Tax Act, it seems certain that as to services rendered by the Bank for which it does not collect the tax, the Bank is the taxpayer. The state looks only to the Bank to receive the amount of tax, whether collected or not. The Act is so drawn that it makes no distinction, so far as liability of those performing services is concerned, between taxes collected by the Bank from its customers and taxes due the state that are not collected. Even though, strictly speaking, the Bank may be only the agent of the state and a [fol. 20] trustee as to money in its hands collected as taxes from the purchasers of the services, still the Act imposes upon it burdens with reference to taxes which it must discharge for the privilege of doing business and performing the services.

The burdens imposed upon the Bank by the Act, in my judgment, constitute an interference with the proper functions of a governmental agency and impair the efficiency of the Bank to discharge the duties for the performance of which it was created.

The demurrer to the answer is overruled.

It is the judgment and declaration of the Court that the services performed by defendant in operating safety deposit boxes and vaults are exempt from taxation under the service tax law of Colorado.

Plaintiff's exceptions are noted. Stay of execution for thirty (30) days is allowed, and plaintiff may have time and until sixty (60) days within which to prepare, tender and have settled a bill of exceptions.

Motion for new trial is dispensed with.

Done and signed in open court this 9th day of June, A. D. 1938.

By the Court.

Robert W. Steele, Judge.

First Declaratory Decree and Judgment—June 23, 1938

[fol. 21] This cause coming on to be heard, upon its merits, upon plaintiff's amended petition for declaratory judgment and his amendment to paragraph VII thereof, upon the defendant's answer thereto, upon plaintiff's demurrer to the said answer, and upon the stipulation of the parties, dated May 9, 1938, filed herein; the plaintiff appearing by his attorneys, Byron G. Rogers, Attorney General, and Elmer P. Cogburn, Assistant Attorney General, and the defendant appearing by its attorneys, Walter W. Blood, and Bartels, Blood and Bancroft; and the said attorneys having argued this cause; and the Court having taken it under advisement and having been fully advised in the premises and having on June 9, 1938, rendered and filed a memorandum opinion herein (reference to which is hereby made and which by reference is hereby made a part hereof);

The Court doth Find, and Conclude as a Matter of Law

That the defendant is a national banking association, organized and existing under and by virtue of the Constitution and the Acts of Congress of the United States of America, and as such is an agency or instrumentality of the United States; that the services performed by the defendant in operating safety deposit boxes and vaults are incident to, and an integral part of, its banking business, for the performance of which it was and is chartered and enfranchised as such governmental agency or instrumentality; that as to any service tax imposed upon the said services under the Colorado Public Revenue Service Tax Act of 1937 (Session Laws of Colorado 1937, Chapter 240), the defendant Bank as the one rendering or performing such services would be the taxpayer, or, if not, would be burdened by such a tax; and that, therefore, the said services are by Section 7 of the said Act expressly exempt from taxation under it [fol. 22] as "services rendered or performed which the State of Colorado is prohibited from taxing under the Constitution or laws of the United States or the State of Colorado"; and that, accordingly, the plaintiff's demurrer to the defendant's answer should be overruled, and the Court should order, adjudge, decree and declare as hereinafter stated;

Now, Therefore, It is hereby Ordered:

That the demurrer of the plaintiff, Homer F. Bedford, Treasurer as aforesaid, to the said answer of the defend-

ant, The Colorado National Bank of Denver, shall be and is hereby overruled;

And the plaintiff having elected to stand upon the ruling of the Court upon the said demurrer, pursuant to the said stipulation on file herein;

Now, Therefore, the Court doth further Order, Decree, Declare and Adjudge:

1. That all services performed by defendant in operating safety deposit boxes and vaults are exempt from taxation under the said service tax law of Colorado; and

2. That the defendant do have and recover of and from the plaintiff its costs in this cause expended.

Done in open court this 23rd day of June, 1938, nunc-pro-tunc as of June 9, 1938.

By the Court:

Robert W. Steele, Judge.

[fol. 23] IN SUPREME COURT OF COLORADO

No. 14405

WRIT OF ERROR—Filed July 1, 1938

THE PEOPLE OF THE STATE OF COLORADO:

To the Clerk of the District Court of the City and County of Denver, State of Colorado, Greeting:

Because in the record and proceedings, as also in the judgment, in a suit which was lately in the District Court of the City and County of Denver, Colorado, between Homer F. Bedford as Treasurer of State of Colorado, Plaintiff; and The Denver Safe Deposit Company, et al., Defendants, manifest error hath intervened to the great injury of the said plaintiff, as we are informed, and we being willing that said error, if any there be, should in due manner be corrected, and full and speedy justice done to the parties aforesaid in this behalf, Do Command You that when prepared as provided by the rules of our Supreme Court, you send to the Justices of our said Court at Denver, in said State, under the seal of your Court, with all convenient dispatch, the record on error containing a statement of so much of the

pleadings, proceedings and evidence, or other matters in this action, as may be necessary to present the errors complained of, together with this writ, so that the said Justices may have them at the place of holding the said Supreme Court, in Denver, twenty days from this date, that the record and proceedings aforesaid being inspected, they may cause to be done thereupon, for correcting that error what, of right, according to law and the rules of said Court, ought to be done.

Witness the Honorable H. P. Burke, Chief Justice of our Supreme Court, and the seal thereof, affixed at my office in the City of Denver, this 1st day of July, A. D. 1938. A. H. White, Clerk of the Supreme Court, by C. W. Sheafor, Deputy Clerk. (Supreme Court Seal.)

[fol. 24] IN SUPREME COURT OF COLORADO

No. 14405

HOMER F. BEDFORD, as Treasurer of the State of Colorado, Plaintiff in Error,

v.

THE COLORADO NATIONAL BANK, a Banking Corporation, Defendant in error

Error to the District Court of the City and County of Denver

JUDGMENT AND DECISION—December 27, 1938

This cause having been brought to this Court by writ of error to review the judgment of the District Court of the City and County of Denver, and having been heretofore argued by counsel and submitted to the consideration and judgment of the Court upon the matters assigned as constituting error in the proceedings and judgment of said District Court, and the Court being now equally divided, said judgment stands affirmed by operation of law.

It is further ordered that this cause be remanded to said District Court for such other and further proceedings, according to law, as shall be necessary to the final execution of the judgment of said District Court, in the cause, notwithstanding the said writ of error.

Exhibit C

Colorado Supreme Court Decision of Affirmance of December 27, 1938

Mr. Justice Holland does not participate in the consideration of this cause. Mr. Chief Justice Burke, Mr. Justice Bouck and Mr. Justice Knous think the judgment should be [fol. 25] affirmed, while Mr. Justice Hilliard, Mr. Justice Young and Mr. Justice Bakke think it should be reversed. The court being "equally divided in opinion, the judgment of the court below shall stand affirmed." Code of Civil Procedure Sec. 439.

In Supreme Court of Colorado

No. 14405

Order Granting Rehearing—January 16, 1939

The Court having considered the petition for a rehearing of this cause, and now being well and fully advised in the premises, doth order that said petition be, and the same is hereby, granted, the opinion of the court withdrawn and the judgment thereon vacated and set aside.

In Supreme Court of Colorado

Opinion—April 17, 1939

This action was brought by plaintiff in error under the Uniform Declaratory Judgments Act, '35 C. S. A., chapter 93, sections 78-92, to obtain a judicial declaration that the state has the power to compel national banks to collect and remit service taxes upon depository services performed by such banks to the public, in compliance with the Public Revenue Service Tax Act of 1937 (S. L. '37, c. 240).

Upon the filing of an amended petition defendant in error answered, to which answer plaintiff in error demurred. The demurrer was overruled. It was previously agreed that the party against whom the ruling on demurrer was made would stand upon such ruling. Plaintiff in error made that selection and the court decreed, "That all services performed by defendant in operating safety deposit boxes and

[fol. 26] vaults are exempt from taxation" under the Public Revenue Service Tax Act, supra. Reversal of that decree is sought here, and the assignment of errors, in substance, raise two questions, namely: (1) Upon whom is the service tax imposed, the party rendering the service or the one who uses it? (2) Does the requirement to collect and remit the tax upon depository services constitute a burden upon, or an interference with, the proper functions of a national bank as a governmental agency?

Reference will hereinafter be made to plaintiff in error as treasurer and to defendant in error as the bank.

It may be conceded that if the bank is the party upon which the tax is solely imposed, then the act as to national banks would be contrary to the federal statutes (U. S. Revised Statutes, section 5219; U. S. C. A. Title 12, section 548), and invalid. The pertinent provisions are:

"The legislature of each state may determine and direct, subject to the provisions of this section, the manner and place of taxing all the shares of national banking associations located within its limits. The several states may (1) tax said shares, or (2) include dividends derived therefrom in the taxable income of an owner or holder thereof, or (3) tax such associations on their net income, or (4) according to or measured by their net income, provided the following conditions are complied with:

"1. (a) The imposition by any state of any one of the above four forms of taxation shall be in lieu of the others, except as hereinafter provided in subdivision (c) of this clause."

[fol. 27] This section was intended to protect capital invested in national banks from unfriendly discrimination by the states in the exercise of the taxing power. Adams v. Nashville (Tenn. 1877), 95 U. S. 19, 30, 24 L. Ed. 369; Mercantile National Bank v. City of New York (C. C. N. Y. 1886), 28 F. 776 (affirmed 1887), 121 U. S. 138, 7 Sup. Ct. 826, 30 L. Ed. 895; Roberts v. American National Bank of Pensacola (1929), 97 Fla. 411, 121 So. 554; Des Moines National Bank v. Fairweather (Iowa, 1923), 263 U. S. 103, 106, 44 Sup. Ct. 23, 68 L. Ed. 191; Minnehaha National Bank v. Anderson (Dist. Ct., S. D. 1924), 2 F. (2d) 897.

It heretofore has been determined that a state can only tax a national bank with the consent of Congress and not

otherwise. First National Bank v. Anderson, 269 U. S. 341, 46 Sup. Ct. 135, 70 L. Ed. 295, and numerous other authorities. Section 5219, supra, furnishes the exclusive authority governing state taxation as to national banks. Bank of California v. Richardson, 248 U. S. 476, 39 Sup. Ct. 165, 63 L. Ed. 372.

Whether this principle of implied constitutional immunity from the taxation of national banks has been modified, when a nondiscriminatory tax is levied on the safety deposit box service performed by such banks, by recent opinions of the Supreme Court of the United States in Graves v. People, ex rel., 59 Sup. Ct. 595, 83 L. Ed. 577, and in State Tax Commission v. Van Cott, 59 Sup. Ct. 605, 83 L. Ed. 588, is not necessary for us to determine. According to the views therein expressed, the trend is definitely to narrow implied constitutional inter-governmental immunity.

Before discussing the assignment of errors, we direct our attention to section 4 (a) of our service tax act, which pro- [fol. 28] vides, in effect, that a bank must procure a license to conduct a safety deposit box business, and conducting such a business without procuring the necessary license constitutes a misdemeanor. Excepted from this provision are persons who hold licenses under any other statute and those performing services of a professional, technical or scientific nature. It is conceded that the bank is authorized under its federal charter to do a safety deposit box business. The state, therefore, cannot require it to take out this license or collect the fee therefor from the bank. Bank of California v. Portland, 157 Ore. 203, 69 P. (2d) 273, 275; Austin v. Seattle, 176 Wash. 654, 30 P. (2d) 646; City of Shelbyville v. Citizens Bank of Shelbyville, 114 S. W. (2d) 719. Section 4 (a), supra, does not contemplate the licensing or collection of the fee therefor from all persons performing and collecting taxable services under the act. In so far as this section is concerned, if applied to national banks, it would, under the above authorities, be invalid. No attempt is made in the instant case to enforce it. In fact, the treasurer says that no license fees are demanded from the bank. The validity of this section of the act, however, does not affect other portions thereof as applied to the bank. Section 22 declares it as the legislative intent that it would have passed the act irrespective of the fact that any one or more sections be declared invalid. It may be assumed, therefore, that the bank is not required to comply with section 4 (a) of the act.

Our first concern under the assignment of errors is whether the service tax involved here is imposed upon the bank and whether it bears this tax burden. We think not.

In our determination of this question it is necessary that [fol. 29] we quote certain pertinent portions of the act, as follows:

"Section 2. (c) The term 'services rendered or performed' shall mean all acts or services rendered, furnished or performed for a valuable consideration by any person engaged in any business or occupation hereinafter designated and defined, when said act or service is rendered, *furnished or performed for the ultimate user thereof. The term 'user' shall mean the person for whom or for whose benefit services are rendered or performed.*

* * * * * * *

"(e) The term 'taxpayer' shall mean any person obligated to account to the state treasurer for taxes collected or to be collected or due the state under the terms of this act.

"(f) The term 'tax' means *either the tax payable by the person procuring or for whose benefit a service is rendered or performed subject to tax,* or the aggregate amount of taxes due from the person rendering, performing or furnishing services during the period for which he is required to report his collections, as the context may require.

* * * * * * *

"(h) * * * taxes paid on gross taxable services represented by accounts found to be worthless and actually charged off for income tax purposes may be credited upon [fol. 30] a subsequent payment of the tax herein provided, but if any such accounts are thereafter collected by the taxpayer, a tax shall be paid upon the amount so collected.

"Section 5. From and after the effective date of this act there is hereby *levied and imposed upon the services specified in this act and measured by the amount paid* therefor and there shall be collected and paid:

* * * * * * *

"(c) A tax equivalent to two (2) per cent of the value of services rendered or performed by any person engaging or continuing in any of the following businesses: * * * banks, finance companies, trust companies and depositories, * * *.

"Section 6. Every person rendering or performing services shall be liable and responsible for the payment of the entire amount of the said two (2) per cent tax imposed and payable upon the total taxable services rendered or performed, and shall before the fifteenth day of each month make a return to the state treasurer for the preceding calendar month, and remit all taxes collected and due the state from him, to the state treasurer, *less three (3) per cent thereof to cover the expense of the person rendering or performing services in the collection and remittance of said tax.* • • •

"(b) Persons rendering or performing services shall, as far as practicable, add the tax imposed under this act, or the average equivalent thereof, to the value of services or [fol. 31] charges showing such tax as a separate and distinct item and when added such tax shall constitute a part of such value of service or charge, shall be a debt from the user to the person rendering or performing service until paid, and shall be recoverable at law in the same manner as other debts.

• • • • • • •

"(d) It shall be unlawful for any person rendering or performing service to advertise or hold out or state to the public or to any user, directly or indirectly, *that the tax or any part thereof imposed by this act will be assumed or absorbed by him* or that it will not be added to the value of service rendered, or if added that it or any part thereof will be refunded. Any person violating any of the provisions of this section shall be guilty of a misdemeanor.

"Section 7. All services rendered or performed, the rendering or performing of which is now subject to an excise tax under the laws of this state, and all services rendered or performed to the United States government, to the state of Colorado, its departments and institutions, and the political subdivisions thereof in their governmental capacities only and all services rendered or performed to religious, charitable and eleemosynary corporations, in the conduct of the regular religious, charitable or eleemosynary functions and activities and all services rendered or performed to or by educational institutions, directly under the super- [fol. 32] vision and control of a religious sect or denomination in the conduct of the regular educational functions and

activities, and all *services rendered or performed which the state of Colorado is prohibited from taxing under the Constitution or laws of the United States,* or the state of Colorado, *shall be exempt from taxation under this act;* provided that should a dispute arise between the person rendering or performing services and the user or state treasurer as to whether or not any services rendered or performed is exempt from taxation hereunder, nevertheless the person rendering or performing services shall collect and the user shall pay such tax, and the person rendering or performing services shall thereupon issue to the user a receipt or certificate on forms prescribed by the treasurer, showing the names of the person rendering or performing services and the user, the items of services rendered, the date, the value of services, the amount of tax paid and a brief statement of the claim of exemption. The user thereafter may apply to the state treasurer for a refund of such taxes, and it shall be the duty of the treasurer to determine the question of exemption, subject to review by the courts, as hereinafter provided; *provided* further that a refund shall be made, or a credit allowed, for the tax so paid under dispute by any user who has an exemption as in this act provided. Such refund shall be made by the state treasurer after compliance with the following conditions precedent:

[fol. 33] "Applications for refund must be made within sixty (60 days after the rendering or performance of services whereon an exemption is claimed and must be supported by the affidavit of the user accompanied by the original paid invoice, receipt and certificate issued by the person rendering or performing services, and be made upon such forms as shall be prescribed and furnished by the state treasurer, which forms shall contain such information as said state treasurer shall prescribe. Upon receipt of such application the treasurer shall examine same with all due speed and shall give notice to the applicant by order in writing of his decision thereon. Aggrieved applicants may, within ten (10) days after such decision is mailed to them, petition the treasurer for a hearing on the claim in the manner provided in this act. The right of any person to a refund under this article shall not be assignable and such application for refund must be made by the same person who paid the tax thereon as shown in the invoice, receipt or certificate."

"Section 12. All sums of money paid by the user to the person rendering or performing services as taxes imposed by this act shall be and remain public money, the property of the state of Colorado, in the hands of such person rendering or performing services and he *shall hold the same in trust for the sole use and benefit of the state of Colorado until* paid to the state treasurer as herein provided, and for failure to so pay to the state treasurer, such person ren-
[fol. 34] dering or performing services may be punished as provided by law." (All italics ours.)

The legislative intent seems to be clear, i. e., to impose a tax upon the user of the service. The levy is "imposed upon the services specified in this act." In holding that this is a tax upon the user, we are fortified by a number of authorities construing similar acts. In fact, the great weight of authority is definitely in that direction.

Breaux Ballard v. Shannon, 271 Ky. 553, 112 S. W. (2d) 996;
Covington v. Tax Commission, 257 Ky. 84, 77 S. W. (2d) 386;
Wiseman v. Phillips, 191 Ark. 63, 84 S. W. (2d) 91;
Morrow v. Henneford, 182 Wash. 625, 47 P. (2d) 1016;
School District v. Smith (Mo.), 111 S. W. (2d) 167;
Long v. Roberts & Son, 234 Ala. 570, 176 So. 213.

In construing a similar act (Sales Tax Act, chapter 144, '35 C. S. A.), we have recently held that the sales tax involved is not imposed upon the dealer; that he is merely the state's agent to collect and he is compensated for that service. Bedford v. Hartman Brothers, Inc., 104 Colo. 190, 89 P. (2d) 584.

In the instant case the direct tax burden is not upon the bank. It is the state's agent to collect and it is compensated for that service. The tax when collected by the bank is the property of the state, which it holds in trust for the sole use and benefit of the state until paid to the treasurer as provided by law. While the bank is liable to the state for the tax, the act itself is so worded that the bank does not carry any of the tax burden unless it refuses to comply with certain terms of the act. To that extent, as applied to the bank, it is a "taxpayer" within the meaning of section 2 (e), supra, and the liability is a "tax" within the mean-
[fol. 35] ing of section 2 (f), supra.

The second question under the assignment of errors requires us to answer whether the duties imposed upon national banks by the terms of the act, requiring them to collect and remit the tax upon their safety deposit box service, constitutes a burden upon or an interference with the proper functions of a national bank as a governmental agency. This also involves the exemption in section 7, supra, upon which the bank relies. That a national bank is a governmental agency and therefore an instrumentality through which the government performs certain fiscal functions cannot be questioned. M'Culloch v. Maryland, 4 Wheat. 316, 4 L. Ed. 579. The national bank system was devised, primarily, to provide a national currency, secured by a pledge of United States bonds, and they are agencies or instruments of the government for that purpose. Davis v. Elmira Savings Bank, 161 U. S. 275, 16 Sup. Ct. 502, 40 L. Ed. 700. Their powers are defined and limited by the acts of Congress. Federal Intermediate Credit Bank v. L'Herisson, 33 F. (2d) 841.

There is no congressional requirement that a national bank conduct a safety deposit box service. The relationship created under such service is that of bailor and bailee and not that of debtor and creditor. Tuckerman v. Mearns, 262 F. 607. A depository service rendered by a national bank is purely incidental to and not a necessary incident to its banking business.

Under Title 12, U. S. C. A., section 24, it is provided, "That in carrying on the business commonly known as the safe-deposit business the association shall not invest in the capital stock of a corporation organized under the law of [fol. 36] any State to conduct a safe-deposit business in an amount in excess of 15 per centum of the capital stock of the association actually paid in and unimpaired and 15 per centum of its unimpaired surplus." This would indicate that a national bank may conduct a safety deposit box business under a separate state organization, with limitations.

Section 5228, United States Revised Statutes, title 12, U. S. C. A., section 133, prohibits national banks from continuing business after notice by the comptroller of default, "except to receive and safely keep money belonging to it, and to deliver special deposits." National Bank v. Graham, 100 U. S. 699, 25 L. Ed. 750. From this it may be inferred that safety deposit box service is clearly separable from the

banking business as a governmental instrumentality under the federal law.

Counsel for plaintiff in error place great reliance upon the case of Bank of California v. Portland, supra. That case involved only authority of the city to require a license and payment of a fee therefor by banks conducting a business of "safe-deposit vault." Much said in that case concerning the power of national banks to conduct safety deposit vaults is merely obiter dicta. We already have indicated that we are not here concerned with the imposition of license fees on banks which conduct a safety deposit box business. We are in agreement with the conclusions announced in the Portland case.

That the tax involved in the instant case is non-discriminatory cannot be questioned. It applies to all banks, state and national, and to any person conducting a safety deposit [fol. 37] box business, independent of banking operations. We do not disagree with cases which hold that the receiving of special deposits is a power incidental to the business of banking. What we do say is, that it is not a necessary power to the conduct of a banking business, the absence of which would prevent the bank from discharging its duties to the government. In other words, there is nothing in the service tax act that would burden the bank, as a governmental instrumentality, in conducting its banking business. In re Leavy, 85 F. (2d) 25. How, we may ask, do the requirements of the service tax act interfere with any powers of the bank or burden its governmental activities? Every law, state or national, controlling banks, implies a restraint, but is the restrain involved here such a burden upon national banks as would impair their operations as governmental agencies?

In McClellan v. Chipman, 164 U. S. 347, 17 Sup. Ct. 85, 41 L. Ed. 461, Mr. Justice White, commenting upon the relationship between state and federal laws, as applied to national banks, quotes from National Bank v. Commonwealth, 9 Wall. 353, 362, as follows:

"National banks 'are subject to the laws of the state, and are governed in their daily course of business far more by the laws of the state than of the nation. All their contracts are governed and construed by state laws. Their acquisition and transfer of property, their right to collect their debts, and their liability to be sued for debts, are

based on state law. It is only when the state law incapacitates the banks from discharging their duties to the government that it becomes unconstitutional.' "

[fol. 38] There is nothing in the service tax act which incapacitates the bank from discharging its duties to the government. That, after all, is the test: whether there is any unconstitutional interference with the operations of, or burden imposed upon, the bank by the applicable provisions of the act.

Mr. Chief Justice Hughes, in the recent case of James v. Dravo Contracting Co., 302 U. S. 134, 82 L. Ed. 155, 58 Sup. Ct. 208, discusses the validity of a state income tax imposed by the state of West Virginia upon the gross receipts of the Bravo Company under contracts with the United States, as follows:

"Second. Is the tax invalid upon the ground that it lays a direct burden upon the federal government? The Solicotor General, speaking for the government, supports the contention of the state that the tax is valid. Respondent urges the contrary.

"The tax is not laid upon the government, its property or officers. Dobbins v. Commissioners, 16 Pet. 435, 499, 450.

"The tax is not laid upon an instrumentality of the government. [Citing cases.] Respondent is an independent contractor. The tax is non-discriminatory.

"The tax is not laid upon the contract of the government. [Citing cases.] The application of the principle which denies validity to such a tax has required the observing of close distinctions in order to maintain the essential freedom [fol. 39] of government in performing its functions, without unduly limiting the taxing power which is equally essential to both nation and state under our dual system."

Mere operation of safety deposit vaults by a national bank does not, in itself, involve a governmental relation with the federal government. In fact, recent federal authorities give basis for the belief that even if the service tax were imposed upon the bank, under the circumstances in the instant case, it would not be an interference with any instrumentality of the government and would be valid. It is not necessary for us to, and we do not, pass upon that question.

Counsel for the bank argue that the creation of a first and prior lien upon it (see section 11, Service Act) in the event of its failure to collect and pay, imposes a direct burden upon it as a federal instrumentality. Whether or not this contention is well founded is not an issue in the instant case. We leave that question open. The act is enforceable without the creation of this lien as applied to a national bank.

We conclude, that the tax created by the service tax act is imposed, not upon the bank but upon the user of the service, and that the requirement that the bank collect and pay the same to the treasurer, under the circumstances detailed in the act, is not an unconstitutional burden upon, nor does it unlawfully interfere with, the bank as a governmental instrumentality. The constitutional immunity claimed by the bank does not apply.

In view of our conclusion, we do not discuss other questions raised.

[fol. 40] The judgment is reversed and the cause remanded, with instructions to sustain the demurrer to the answer of the bank, and for further proceedings according to law.

Mr. Justice Burke and Mr. Justice Knous dissent.

Mr. Justice Francis E. Bouck not participating.

IN SUPREME COURT OF COLORADO

No. 14405

JUDGMENT—April 17, 1939

This cause having been brought to this court by writ of error to review the judgment of the District Court of the City and County of Denver, and having been heretofore argued by counsel and submitted to the consideration and judgment of the court upon the matters assigned as constituting error in the proceedings and judgment of said District Court, and it now appearing to the court that there is manifest error in the proceedings and judgment of said District Court,

It is therefore ordered and adjudged that the judgment of said District Court be, and the same is hereby, reversed, annulled and altogether held for naught; and that this cause

be remanded to said District Court which is directed to sustain the demurrer to the answer of the bank, and for further proceedings according to law.

IN SUPREME COURT OF COLORADO

No. 14405

REMITTITUR

The said cause was carried to the Supreme Court of the State of Colorado on writ of error, by Homer F. Bedford, Treasurer, in a cause there numbered 14405, resulting in a reversal of the foregoing judgment of the District Court, [fol. 41] and in a decision and opinion reported in 104 Colo. 311, 91 Pac. (2d) 469, and on June 14, 1939, a remittutur issued from the said Supreme Court to the District Court of the City and County of Denver and State of Colorado, reading as follows:

Whereas, lately in the District Court of the City and County of Denver, state aforesaid, in a certain cause therein pending between Homer F. Bedford, as Treasurer of the State of Colorado, plaintiff, and The Denver Safe Deposit Company et al., defendants, the judgment of said District Court in said cause rendered was against the said plaintiff.

And Whereas, the said cause was brought into our Supreme Court of the State of Colorado, by writ of error to said District Court.

And Thereas, at the April Term of our Supreme Court, in the year of our Lord one thousand nine hundred and thirty-nine, the said cause came on to be heard before our said Supreme Court on the 17th day of April, A. D. 1939 (the same being one of the juridical days of said term), and the following proceedings were had and entered of record in said cause, to-wit:

No. 14405

"HOMER F. BEDFORD, as Treasurer of the State of Colorado, Plaintiff in Error,

vs.

THE COLORADO NATIONAL BANK OF DENVER, a National Banking Association, Defendant in Error

This cause having been brought to this Court by writ of [fol. 42] error to review the judgment of the District Court

of the City and County of Denver, and having been heretofore argued by counsel and submitted to the consideration and judgment of the Court upon the matters assigned as constituting error in the proceedings and judgment of said District Court, and it now appearing to the Court that there is manifest error in the proceedings and judgment of said District Court,

It is therefore ordered and adjudged that the judgment of said District Court be, and the same is hereby, reversed, annulled and altogether held for naught; and that this cause be remanded to said District Court which is directed to sustain the demurrer to the answer of the Bank, and for further proceedings according to law.

Now, Therefore, this cause is remanded to you, the said District Court, in and for the said City and County of Denver and State aforesaid, that such further proceedings may be had in said cause as shall conform to the judgment of this Court, entered as aforesaid, as also with the opinion filed therein.

Witness the Honorable Benjamin C. Hilliard, Chief Justice of our Supreme Court and the seal thereof, affixed at my office in the City of Denver, this 14th day of June, A. D. 1939.

A. H. White, Clerk Supreme Court, by O. E. Rickerson, Deputy."

In District Court of City and County of Denver

Defendant's Bill of Exceptions

On September 12, 1939, the cause again came on for hearing in the said District Court, pursuant to the said remittitur.

The Court then entered an order vacating, setting aside and holding for naught its former order overruling the [fol. 43] plaintiff's demurrer to defendant's answer, and the defendant excepted.

It also entered an order vacating, setting aside and holding for naught the said first judgment and decree, and the defendant excepted.

It also entered an order sustaining the plaintiff's demurrer to the defendant's answer, and the defendant excepted; and elected to stand upon its answer and declined to plead further. The plaintiff then tendered to the Court a judgment and decree and requested that the same be signed,

entered and filed; and the defendant thereupon tendered its written objections thereto. The Court overruled the said objections, signed the said judgment and decree, and the defendant excepted thereto for the reasons stated in its objections.

Objections of the Defendant to the Presented Declaratory Judgment and Decree

The said objections and exceptions are as follows:

The Colorado National Bank of Denver, defendant above named, by its attorneys, objects to the entry of the presented judgment and decree for the following reasons, to-wit:

I

That by the said judgment and decree the Court will decide this cause in favor of the validity of the Colorado Public Revenue Service Tax Act when, in law, the said Act is repugnant to the Constitution and laws of the United States insofar as the said Act affects the defendant Bank.

II

That it will deny to the defendant Bank rights, privileges and immunities specially set up in the answer of the defendant Bank and in its arguments, and claimed by it under the [fol. 44] Constitution, statutes of, and authority exercised under, the United States.

III

That the said judgment and decree, and the findings and conclusions therein made, are contrary to the law, and to the material facts pleaded and admitted by the said demurrer, in each and all of the following particulars, to-wit:

(1) In holding that the defendant Bank's operation of its safety deposit vaults, as described in its answer, and admitted by the said demurrer, is "aside from and outside its regular business" as a national bank.

(2) In holding that the said services performed by the defendant Bank are not within the exemption of Section 7 of the said Act, providing that "all services rendered or performed which the State of Colorado is prohibited from taxing under the Constitution or the laws of the United

States * * * shall be exempt from taxation under this Act."

(3) In holding that the said Act does not violate the Acts of Congress of the United States, and particularly U. S. R. S., Sec. 5219, as amended (U. S. C. A. Title 12, Sec. 548).

(4) In determining and holding that the tax on the defendant Bank's depository services is imposed on the user of the said services, and not on the defendant Bank, and, notwithstanding this, in further determining and holding that the Bank is responsible or liable for the said tax on its said services, whether or not it collects the amount thereof from the users of its said services.

(5) In holding that the said Act, in requiring the defendant Bank to collect the said tax on its said services, and, whether or not collected, to pay the same to the State Treasurer, and otherwise to be subjected to all burdens, [fol. 45] liabilities, fines and penalties provided in the said Act, does not impose an unconstitutional or unlawful burden upon or interference with the defendant Bank as a Governmental Agency or instrumentality.

(6) In holding that Section 10 of the rules, regulations and interpretations recited in the said decree is proper and valid.

(7) In holding that Section 27 of the rules, regulations and interpretations recited in the said decree is proper and valid.

(8) In holding that the plaintiff Treasurer need not apply the said Act so as to exempt the defendant Bank, as a Federal Agency or instrumentality, from the said tax, when, as shown by his other rulings, regulations and interpretations of the said Act, he so applies it as to exempt all other Federal Agencies and instrumentalities from the said tax; and in this respect his said application of the said Act amounts to an unlawful discrimination repugnant to the Fourteenth Amendment of the Constitution of the United States, and also to the Constitution of the State of Colorado.

(9) In holding that the said Act may, without the acquiescence or consent of the defendant Bank, conscript it as an agent of the state to collect and remit the said tax on any part of its banking services, or else to be subjected

to the burdens, liabilities, fines and penalties which the Act imposes.

IV

That the said judgment and decree, if entered, will result in a decision repugnant to the Acts of Congress, relating to national banks, adopted pursuant to the Governmental powers conferred upon the Congress by the United States Constitution, and particularly Article I, Section 8, thereof.

[fol. 46]

V

That the said judgment and decree, if entered, will result in a decision repugnant to each and all of the following Constitutional provisions (national and state) to-wit:

From the United States Constitution and Amendments:

Art. I, Sec. 10. "No state shall * * * pass any law impairing the obligation of contracts."

Art. V of Amendments. "No person shall be * * * deprived of life, liberty or property without due process of law; nor shall private property be taken for public use without just compensation."

Art. XIII, Sec. 1, of Amendments. "Neither slavery nor involuntary servitude, except as punishment for crime, whereof the party shall have been duly convicted, shall exist within the United States."

Art. XIV, Sec. 1, of Amendments. "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law."

From the Colorado Constitution:

Art. II, Sec. 15. "Private property shall not be taken * * * for public or private use without just compensation."

Art. II, Sec. 25. "No person shall be deprived of life, liberty or property without due process of law."

Art. II, Sec. 26. "There shall never be in this state * * * involuntary servitude except as punishment for a crime, whereof the party shall have been duly convicted."

Art. XII, Sec. 2. "No person shall hold any * * * em-
[fol. 47] ployment of trust * * * under the laws of the State * * * without devoting his personal attention to the duties of the same."

IN DISTRICT COURT OF CITY AND COUNTY OF DENVER

SECOND DECLARATORY JUDGMENT AND DECREE—September 12, 1939

This cause coming on to be heard, upon its merits, upon plaintiff's amended petition for declaratory judgment and his amendment to paragraph VII thereof, upon the defendant's answer thereto, upon plaintiff's demurrer to the said answer upon the sustaining of the said demurrer, upon the stipulation of the parties to stand on the ruling on the demurrer to defendant's answer, dated and filed herein on May 9, 1938, and also upon the remittitur from the Supreme Court of the State of Colorado in the cause therein entitled "Homer F. Bedford, as Treasurer of the State of Colorado, Plaintiff in Error v. The Colorado National Bank, a Banking Corporation, Defendant in Error," and numbered 14405, and the opinion rendered in the said cause on April 17, 1939, reversing the order overruling the demurrer to the answer and reversing the judgment entered accordingly; and plaintiff appearing by his attorneys, Byron G. Rogers, Attorney General, and Elmer P. Cogburn, Assistant Attorney General, and the defendant appearing by its attorneys, Walter W. Blood, and Bartels, Blood and Bancroft; and the Court having fully considered all of the foregoing and being now sufficiently advised in the premises;

The Court doth find and conclude as a matter of law:

That the defendant is a national banking association organized and existing under and by virtue of the Acts of Congress of the United States of America, and as such is [fol. 48] an agency or instrumentality of the United States; that the services performed by the defendant in operating safety deposit boxes and vaults do not involve any governmental relation with the United States; that the service tax imposed by the Colorado Public Revenue Service Tax Act of 1937 (S. L. of Colo. 1937, Ch. 240, as readopted, extended and amended by House Bill No. 352, adopted by the General Assembly of the State of Colorado and ap-

proved May 1, 1939), as applied to the depository services performed by the defendant Bank, is not an unlawful interference with an instrumentality of the United States; that the following quoted paragraphs or sections numbered 10 and 27 of the rules, regulations and interpretations, prescribed and published pursuant to the said Act by the plaintiff on or about June 10, 1937, and republished, as amended, on October 22, 1937, with respect to depository services performed by the defendant Bank, are proper and valid:

"10. Banks. Services rendered or performed by Banks were included in the Act. It now appears that the law is invalid as applied to National Banks.

Following the general principle of law and taxation now established, to the effect that where a tax statute intended to apply statewide to all banks, if invalid as to National Banks is invalid as to all State Banks, the service tax is therefore invalid as to all banks, State and National. Provided, however, that where a bank or other similar institution, whose regular services are not subject to the service tax, owns or operates a taxable business or performs taxable services aside from and outside its regular business, such as the operation of safety deposit vaults, hotel, lodging house, real estate brokerage services, etc., such outside [fol. 49] services are taxable and the bank must collect and remit the tax thereon."

"27. Depositories. Such services rendered as the furnishing of safety vaults by depositories or banks come within the Act, and the tax applies to the charge made therefor." that the said depository services performed by the defendant Bank are not exempt from the application of the said Act under the provisions of Section 7 thereof; that the tax created by the Service Tax Act is imposed, not upon the Bank, but upon the user of the service, and does not violate U. S. Revised Statutes, Section 5219; U. S. C. A. Title 12, Section 548; and that the requirement that the Bank collect and pay the same to the State Treasurer, in the manner provided in the Act, is not an unconstitutional burden upon, nor does it unlawfully interfere with, the Bank as a governmental instrumentality; and accordingly, the Court should now order, adjudge, decree and declare the law as hereinafter stated;

Now, Therefore, the Court Doth Order, that the order heretofore entered herein overruling the demurrer of plain-

tiff to defendant's answer and the judgment and decree thereupon rendered and entered herein be, and they hereby are, vacated and set aside, and the said demurrer of plaintiff to defendant's answer be, and hereby is, sustained; and

It Is Decreed, Declared and Adjudged:

1. That the services performed by the defendant Bank in operating safety deposit boxes and vaults, as described in the pleadings herein, are not exempt from taxation under the said Service Tax Act of Colorado; that the said services are taxable pursuant to the terms of the said Act. [fol. 50] and within the provision of the said Act governing depositories, and are within the said paragraphs or sections numbered 10 and 27 of the said rules, regulations and interpretations, and they, as well as the said Act, relating to the said depository services, are proper and valid, in all respects, as to the duties, burdens, responsibilities, liabilities, fines and penalties imposed upon the Bank, in performing the said depository services, to collect and account for, and to pay the said tax.

Done in open court this 12th day of September, 1939.
By the Court.

Robert W. Steele, Judge.

In Supreme Court of Colorado

No. 14684

Writ of Error—Filed November 7, 1939

The People of the State of Colorado to the Clerk of the District Court of the City and County of Denver, State of Colorado, Greeting:

Because in the record and proceedings, as also in the judgment, in a suit which was lately in the District Court of the City and County of Denver, Colorado, between Homer F. Bedford, as Treasurer of the State of Colorado, Plaintiff, and The Denver Safe Deposit Company, a Corporation, et al., Defendants, manifest error hath intervened to the great injury of The Colorado National Bank of Denver, a National Banking Association, as we are informed, and we being willing that said error, if any there be, should [fol. 51] in due manner be corrected, and full and speedy

justice done to the parties aforesaid in this behalf, Do Command You that when prepared as provided by the rules of our Supreme Court, you send to the Justices of our said Court at Denver, in said State, under the seal of your Court, with all convenient dispatch, the record on error containing a statement of so much of the pleadings, proceedings and evidence, or other matters in this action, as may be necessary to present the errors complained of, together with this writ, so that the said Justices may have them at the place of holding the said Supreme Court, in Denver, twenty days from this date, that the record and proceedings aforesaid being inspected, they may cause to be done thereupon, for correcting that error what, of right, according to law and the rules of said Court, ought to be done.

Witness the Honorable Benjamin C. Hilliard, Chief Justice of our Supreme Court, and the seal thereof, affixed at my office in the City of Denver, this 7th day of October, A. D. 1939.

A. H. White, Clerk of the Supreme Court, by O. E. Rickerson, Deputy Clerk. (Supreme Court Seal.)

IN SUPREME COURT OF COLORADO

No. 14684

ASSIGNMENTS OF ERROR—Filed November 7, 1939

Now comes The Colorado National Bank of Denver, plaintiff in error, and for an assignment of errors respectfully shows the Court and avers that upon the record and in [fol. 52] the proceedings in the above entitled cause, in the Court below, there were manifest and material errors in the following, to-wit:

I

That by the final declaratory judgment and decree rendered and entered, the Court decided this cause in favor of the validity of the Colorado Public Revenue Service Tax Act when, in law, the said Act is repugnant to the Constitution and laws of the United States insofar as the said Act affects a national bank.

II

That the said final declaratory judgment and decree denies to the plaintiff in error Bank rights, privileges and im-

munities specially set up in its answer and in its arguments, and claimed by it under the Constitution and statutes of the United States and its authority exercised under the United States.

III

That the said judgment and decree, and the findings and conclusions therein made, are contrary to the law, and to the material facts pleaded and admitted by the demurrer of the defendant in error, Treasurer, to the Bank's answer to the amended petition for a declaratory judgment, in each and all of the following particulars, to-wit:

(1) In holding that the Bank's operation of its safety deposit vaults, as described in its answer, and admitted by the said demurrer, is "aside from and outside its regular business" as a national bank.

(2) In holding that the said services performed by the Bank are not within the exemption of Section 7 of the said [fol. 53] Act, providing that "all services rendered or performed which the State of Colorado is prohibited from taxing under the Constitution or the laws of the United States * * * shall be exempt from taxation under this Act."

(3) In holding that the said Act does not violate the Acts of Congress of the United States, and particularly U. S. R. S., Sec. 5219, as amended (U. S. C. A. Title 12, Sec. 548).

(4) In determining and holding that the tax on the Bank's depository services is imposed on the user of the said services, and not on the Bank, and, notwithstanding this, in further determining and holding that the Bank is responsible or liable for the said tax on its said services, whether or not it collects the amount thereof from the users of its said services.

(5) In holding that the said Act, in requiring the Bank to collect the said tax on its said services, and, whether or not collected, to pay the same to the State Treasurer, and otherwise to be subjected to all burdens, liabilities, fines and penalties provided in the said Act, does not impose an unconstitional or unlawful burden upon or interference with the Bank as a Governmental Agency or instrumentality.

(6) In holding that Sec. 10 of the Rules, Regulations and Interpretations recited in the said decree is proper and valid.

(7) In holding that Sec. 27 of the Rules, Regulations and Interpretations recited in the said decree is proper and valid.

(8) In holding that the State Treasurer need not apply the said Act so as to exempt the Bank, as a Federal Agency or instrumentality, from the said tax, when, as shown by his other rulings, regulations and interpretations of the said Act, he so applies it as to exempt all other Federal Agencies [fol. 54] and instrumentalities from the said tax; and in this respect his said application of the said Act amounts to an unlawful discrimination repugnant to the Fourteenth Amendment of the Constitution of the United States, and also to the Constitution of the State of Colorado.

(9) In holding that the said Act may, without the acquiescence or consent of the Bank, conscript it as an agent of the state to collect and remit the said tax on any part of its banking services, or else to be subjected to the burdens, liabilities, fines and penalties which the Act imposes.

IV

That the said judgment and decree results in a decision repugnant to the Acts of Congress, relating to national banks, adopted pursuant to the governmental powers conferred upon the Congress by the United States Constitution, and particularly Art. 1, Sec. 8, thereof.

V

That the said judgment and decree results in a decision repugnant to each and all of the following Constitutional provisions (national and state), to-wit:

From the United States Constitution and Amendments:

Art. 1, Sec. 10. "No state shall * * * pass any law impairing the obligation of contracts."

Art. V of Amendments. "No person shall be * * * deprived of life, liberty or property without due process of law; nor shall private property be taken for public use without just compensation."

Art. XIII, Sec. 1, of Amendments. "Neither slavery nor [fol. 55] involuntary servitude, except as punishment for crime, whereof the party shall have been duly convicted, shall exist within the United States."

Art. XIV, Sec. 1, of Amendments. "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law."

From the Colorado Constitution:

Art. II, Sec. 15. "Private property shall not be taken * * * for public or private use without just compensation."

Art. II, Sec. 25. "No person shall be deprived of life, liberty or property without due process of law."

Art. II, Sec. 26. "There shall never be in this state * * * involuntary servitude except as punishment for a crime, whereof the party shall have been duly convicted."

Art. XII, Sec. 2. "No person shall hold any * * * employment of trust * * * under the laws of the state * * * without devoting his personal attention to the duties of the same."

Walter W. Blood, Bartels, Blood and Bancroft, Attorneys for Plaintiff in Error.

IN SUPREME COURT OF COLORADO

No. 14684

DECISION—January 8, 1940

The issues presented in this case are in all respects identi- [fol. 56] cal with those raised in Bed ord, State Treasurer v. Colorado National Bank, 104 Colo. 311 (91 P. (2d) 469), in which our holding was adverse to the contentions advanced by plaintiff in error bank. Consistently with our conclusions therein announced, the judgment here under consideration is affirmed.

Mr. Justice Francis E. Bouck not participating.

IN SUPREME COURT OF COLORADO

No. 14684

JUDGMENT—January 8, 1940

This cause having been brought to this Court by writ of error to review the judgment of the District Court of the

City and County of Denver, and having been heretofore argued by counsel and submitted to the consideration and judgment of the Court upon the matters assigned as constituting error, and it now appearing to the Court that there is no error in the proceedings and judgment of said District Court,

It is therefore ordered and adjudged that the judgment of said District Court be, and the same is hereby, affirmed, and that it stand in full force and effect; and that this cause be remanded to said District Court for such other and further proceedings, according to law, as shall be necessary to the final execution of the judgment of said District Court in the cause, notwithstanding the said writ of error.

IN SUPREME COURT OF COLORADO

No. 14684

STIPULATION RE WAIVER OF PETITION FOR REHEARING—Filed January 15, 1940

[fol. 57] It is hereby stipulated between the parties to the above entitled action by their respective attorneys as follows:

1. That the plaintiff in error may and does hereby waive the filing of any petition for rehearing of the judgment, decree, and opinion rendered and entered herein on January 8, 1940.

2. That the foregoing waiver is without prejudice to any right that the plaintiff in error may have to seek and procure a review in the Supreme Court of the United States of this cause, either by appeal or by writ of certiorari.

Dated at Denver, Colorado, January 15, 1940.

Walter W. Blood, Bartels, Blood & Bancroft, Attorneys for Plaintiff in Error. Byron G. Rogers, Attorney General, George K. Thomas, Assistant Attorney General, Elmer P. Cogburn, Assistant Attorney General, Attorneys for Defendant in Error.

IN SUPREME COURT OF COLORADO

No. 14684

PETITION FOR APPEAL TO THE SUPREME COURT OF THE UNITED STATES—Filed January 17, 1940

The Colorado National Bank of Denver, the plaintiff in error above named, considering itself aggrieved by the final judgment or decree and decision rendered and entered on January 8, 1940, in the above entitled case, does hereby appeal from said order to the Supreme Court of the United [fol. 58] States, and prays that this, its appeal, may be allowed; that a transcript of those parts of the record material to and upon which the said judgment, decree, and decision was based, duly authenticated, may be sent to the Supreme Court of the United States; and that a proper order be made relating to the security to be required of the appellant.

Walter W. Blood, Frank N. Bancroft, Bartels, Blood & Bancroft, Attorneys for The Colorado National Bank of Denver, Appellant.

IN SUPREME COURT OF COLORADO

No. 14684

ASSIGNMENTS OF ERROR—Filed January 17, 1940

Now comes The Colorado National Bank of Denver, appellant, and makes and files this, its assignment of errors.

1. That the Supreme Court of the State of Colorado erred in affirming the judgment and decree of the District Court of the City and County of Denver, Colorado.

2. That the Supreme Court of the State of Colorado erred in holding that the Public Revenue Service Tax Act of 1937 (Session Laws of Colorado, 1939, Chapter 158) is valid and applicable to depository services rendered and performed by the appellant bank contrary to the bank's contentions that, as so applied, it is repugnant to the Constitution and laws of the United States, and the particular provisions of each thereof hereinafter cited.

[fol. 59] 3. That the Supreme Court of the State of Colorado erred in confirming, approving, and upholding rules, regulations, and interpretations adopted by the Treasurer of the State of Colorado, and particularly the provisions numbered 10 and 27, published June 10, 1937, and republished October 22, 1937, with reference to the said service tax act, to the effect that depository services performed by a national bank are not banking services, and on such erroneous premise upholding the said act, contrary to the Acts of Congress relating to national banks, and particularly Revised Statutes Section 5136 as amended (U. S. C. A. Title 12, Section 24), and the cases adjudicating them.

4. That the Supreme Court of the State of Colorado erred in holding, adjudging, and deciding contrary to the contentions of appellant, each and all of the following, to-wit:

(1) That, notwithstanding the Acts of Congress relating to national banks, and particularly Revised Statutes Section 5136 as amended, of the said acts, the business of the appellant national bank in operating its safe-deposit vaults and in conducting that business is "aside from and outside" its banking business.

(2) That, notwithstanding the Acts of Congress relating to state taxation of national banks and their business, and particularly Revised Statutes Section 5219 as amended, the State of Colorado may (and by the said service tax act does) tax safe-deposit services rendered by the appellant national bank, even though the said state has elected to tax and is taxing the appellant national bank on its net income, and its real property to the same extent as other real property is taxed.

(3) That the State of Colorado is not prohibited, under [fol. 60] the Constitution and laws of the United States, and particularly Article I, Section 8, Paragraph 18 of the Constitution, the Acts of Congress relating to national banks, and Revised Statutes Section 5219 as amended, and the Courts' decisions thereon applicable to national banks, from taxing safe-deposit services rendered or performed by the appellant national bank; and further, that the state is not prohibited from enforcing against the bank the said Colorado service tax act in each and all of the following particulars: to compel the bank to procure a license from

the state to conduct its said business, and to charge the amount of the said tax to, and to collect or attempt to collect it from the users of its said services; to be liable and responsible therefor to the state, whether collected or not; to keep its books and records and to account to the state, as the state might prescribe; and to suffer the rights of supervision, visitation, and fines and penalties, granted to the state in said act.

(4) That the said service tax act is "proper and valid, in all respects, as to the duties, burdens, fines and penalties imposed upon the bank, in performing the said depository services, to collect and account for and to pay the said tax," unless the bank, involuntarily and coerced by such threatened fines and penalties, acts as a tax collector for the state, as prescribed by the said act, for the compensation therein fixed of three per cent of the amount of the tax on such services, notwithstanding, and contrary to, Article I, Section 8, Paragraph 18 of the Constitution and to each and all of the following provisions of the United States Constitution and Amendments:

Art. 1, Sec. 10. "No state shall * * * pass any law [fol. 61] impairing the obligation of contracts."

Art. V of Amendments. "No person shall be * * * deprived of life, liberty or property without due process of law; nor shall private property be taken for public use without just compensation."

Art. XIII, Sec. 1, of Amendments. "Neither slavery nor involuntary servitude, except as punishment for crime, whereof the party shall have been duly convicted, shall exist within the United States."

Art. XIV, Sec. 1, of Amendments. "No state shall make or enforce any law which shall abridge the privilege or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law."

5. That the Supreme Court of the State of Colorado erred in not holding that the said service tax act is invalid in its application to safe-deposit services performed by the appellant national bank whether the appellant national bank be the taxpayer, or the user of such services be the taxpayer with the bank liable and responsible to pay such tax if it does not collect it in full from the user and pay the state the

amount of the tax (whether collected or not) upon such services less three per cent thereof.

6. That the Supreme Court of the State of Colorado erred in holding that the said service tax act is properly applicable and valid as to safe-deposit services performed by the appellant national bank, though not applicable to any of the bank's other services, thus improperly discriminating in taxation as to one part of the bank's services, without any warrant therefor in the law and contrary to Article V, and [fol. 62] to Article XIV, Section 1, of the Amendments of the United States Constitution.

Walter W. Blood, Frank N. Bancroft, Counsel for Appellant.

[fols. 63-82] IN SUPREME COURT OF COLORADO

No. 14684

ORDER ALLOWING APPEAL AND FIXING SECURITY FOR COSTS—January 17, 1940

The above named The Colorado National Bank of Denver, having prayed for the allowance of an appeal of this cause to the Supreme Court of the United States from the Judgment, decree, and decision rendered and entered in this cause by the Supreme Court of the State of Colorado on the 8th day of January, 1940, and having presented and filed its petition for appeal and an assignment of errors, pursuant to the statutes and rules of the Supreme Court of the United States in such cases made and provided;

It Is Now Here Ordered, That an appeal be, and the same is hereby, allowed to the Supreme Court of the United States from the Supreme Court of the State of Colorado in the above entitled cause as provided by law, and that the Clerk of the Supreme Court of the State of Colorado shall certify a transcript of those parts of the record herein material to and upon which the said judgment, decree, and decision was based, and transmit the same to the Supreme Court of the United States, so that he shall have the same in said Court within sixty days from this date.

And It Is Further Ordered, That security for costs on appeal be fixed at the sum of $500.00.

Done at Denver, Colorado, this 17th day of January, 1940.

Benjamin C. Hilliard, Chief Justice of the Supreme Court of the State of Colorado.

[fol. 83] IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION OF PARTS OF THE RECORD TO BE PRINTED—Filed February 12, 1940

Now comes the appellant in the above entitled cause and states that the points upon which it intends to rely in this Court in this case are as follows:

1. The Colorado Public Revenue Service Tax Act of 1937, if applied to safe-deposit services performed by the appellant national bank, is repugnant to the Constitution and laws of the United States; and particularly so in that:

(a) If the bank is the taxpayer under the said act, it then contravenes Revised Statutes Section 5219 as amended, enacted by the Congress pursuant to the authority vested in it by the United States Constitution and Article I, Section 8 Paragraph 18 thereof.

(b) If the appellant national bank is not the payer of the tax levied and assessed by the said act upon its safe-deposit services, then the act imposes burdens, duties, liabilities, fines, and penalties upon the appellant national bank, and otherwise interfers with it, contrary to the Constitution of the United States, and contrary to the acts of Congress relating to national banks.

2. The operation by the appellant national bank of a safe-[fol. 84] deposit department is a part of its regular banking business under its charter granted pursuant to the acts of Congress; and the State of Colorado is, therefore, prohibited by the Constitution and laws of the United States from taxing its said safe-deposit services, as well as its other banking services and functions.

3. As construed and enforced by the Treasurer of the State of Colorado and the decision and judgment of the Colorado Supreme Court in this cause, the said Service Tax Act is discriminatory and contrary to the United States Constitution.

The appellant further states that the following parts of the record as filed in this Court need be printed by the Clerk for the consideration of this case:

1. The amended petition, as amended, for declaratory judgment, including therein the last amendment to paragraph VII thereof, in lieu of the prior paragraph VII;

2. The answer to the amended petition, as amended;

3. The stipulation of the parties to stand on their said pleadings and on the demurrer of the plaintiff to the said answer;

4. The demurrer of the plaintiff to the said answer;

5. The opinion of the District Court, Robert W. Steele, District Judge, dated June 9, 1938;

6. The first declaratory decree and judgment rendered in the District Court on June 23, 1938;

7. Writ of error in case numbered 14405 in the Supreme Court of the State of Colorado;

[fol. 85] 8. The judgment and decision of the Supreme Court of the State of Colorado rendered in case numbered 14405 on December 27, 1938;

9. The order entered by the Supreme Court of the State of Colorado in case numbered 14405 granting a rehearing from the said judgment and decision;

10. The opinion of the Supreme Court of the State of Colorado in case numbered 14405 rendered on April 17, 1939;

11. The judgment of the Supreme Court of the State of Colorado in case numbered 14405 entered pursuant to the said last opinion;

12. The remittitur from the Supreme Court of the State of Colorado in case numbered 14405;

13. The defendant's bill of exceptions as abstracted in case numbered 14684, including the objections of the defendant to the presented declaratory judgment and decree;

14. The second declaratory judgment and decree of the District Court entered September 12, 1939;

15. The writ of error in case numbered 14684;

16. The assignments of error in case numbered 14684;

17. The decision of the Supreme Court of the State of Colorado rendered in case numbered 14684 on January 8, 1940;

18. The judgment of the Supreme Court of the State of Colorado rendered in case numbered 14684, pursuant to the last said decision.

19. The stipulation of the parties dated January 15, 1940, in case numbered 14684;

20. The petition for appeal;

21. The assignment of errors upon appeal;

[fol. 86] 22. The prayer for reversal;

23. The order allowing the appeal;

24. This statement of points to be relied upon and designation of parts of record to be printed.

Walter W. Blood, Frank N. Bancroft, Counsel for Appellant.

The undersigned hereby acknowledge service upon the appellee above named of a copy of the foregoing at Denver, Colorado, this 17th day of January, 1940.

Byron G. Rogers, Attorney General; George K. Thomas, Assistant Attorney General; Elmer P. Cogburn, Assistant Attorney General, Counsel for Appellee.

[fol. 87] [File endorsement omitted.]

Endorsed on cover: File No. 44,126. Colorado Supreme Court. Term No. 719. The Colorado National Bank of Denver, Appellant, vs. Homer F. Bedford, as Treasurer of the State of Colorado. Filed February 12, 1940. Term No. 719, O. T., 1939.

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